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(March 25, 2004)

**Rule 2-100. Organization as Client**

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**NOTE:** Refer to comment no. 2002-17 (Matthew E. Cavanaugh) and no. 2003-38 (Roderick Leonard), referencing 2-100 and related topics, included in the clear public comment binder.

# RULE AMENDMENT HISTORY (2004)

## Rule 2-100. Communication With a Represented Party

### Current Rule

#### **Rule 2-100. Communication With a Represented Party**

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

#### *Discussion:*

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her

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professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

### **Amendments Operative 1992 (Comparison of Current Rule to 1992 Rule)**

#### **Rule 2-100. Communication With a Represented Party**

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

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(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

#### ***Discussion:***

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize

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communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (*See Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with ~~an individual a~~ party seeking to hire new counsel or to obtain a second opinion. A member contacted by such ~~an individual a~~ party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.)

### **Summary of 1992 Amendments**

Proposed amendment to the fifth paragraph of the Discussion section would add recent case authority in support of the stated proposition.

Proposed amendment to the sixth paragraph of the Discussion section would conform it to the language used in the rule and the rest of the Discussion section. No substantive change is intended.

[December, 1991 green bound rule filing at pg. 12]

# RULE AMENDMENT HISTORY (2004)

## Amendments Operative 1989 (Comparison of 1989 Rule to Former Rule 7-103)

Rule 2-100. ~~7-103. Communicating~~ Communication with A ~~An Adverse Party, Represented by Counsel.~~

- (A) ~~A While representing a client, a member of the State Bar shall not communicate directly or indirectly about the subject of the representation with a party whom he the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. counsel upon a subject of controversy, without the express consent of such counsel.~~
- (B) ~~This rule shall not apply to communications with a public officer, board, committee or body. For purposes of this rule, a "party" includes:~~
- ~~(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or~~
  - ~~(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.~~
- (C) This rule shall not prohibit:
- (1) Communications with a public officer, board, committee, or body;
  - (2) Communications initiated by a party seeking advice or representative from an independent lawyer of the party's choice; or
  - (3) Communications otherwise authorized by law.

### Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorized communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of the government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is to intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

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As used in paragraph (A), “the subject of the representation,” “matter” and “party” are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication.

Subparagraph (C)(2) is intended to permit a member to communicate with an individual seeking to hire new counsel or to obtain a second opinion. A member contacted by such an individual continues to be bound by other rules of Professional Conduct. (See, e.g., rules 1-400 ad 3-310.)

### **Summary of 1989 Amendments (Submitted to the Supreme Court by Supplemental September, 1988 Memorandum)**

As to the Court’s comment regarding the “binding” standard in rule 2-100(B)(2) being ambiguous, the language of the proposed rule was not intended to be substantively different from the “liability” test in the Comment to ABA Model Rule 4.2. Indeed, the “liability” test appears to be a clearer formulation of the concept underlying 2-100(B)(2). In order to clarify the rule, it is recommended that the “liability” test from ABA Model Rule 4.2 be added to 2-100(B)(2) as follows:

An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. which may be binding on such entity or which may be the basis of a claim or defense involving that entity.

[September, 1988 pink bound rule filing at pg. 9]

### **Summary of 1989 Amendments (Submitted to the Supreme Court by December, 1987 Memorandum)**

Paragraph (A) continues the general prohibition found in current rule 7-103 on communication with a represented party and has been amended to prohibit communications with a represented party only when the attorney is already representing a client.

Paragraph (B) is new and is intended to clarify the troubling issue of which employees of an entity may be approached without consent of the attorney for the entity when the entity is the opponent.

The issue has sometimes been analogized to the issue of whether communications between a party’s counsel and that party’s employees are protected by the attorney work product rule and the attorney-client privilege. Some courts have applied the so called “control group test” in this situation. The test restricts the availability of the privilege to a control group—those employees who play a substantial role in deciding and directing the employee’s legal response. In *Upjohn Co. v. United States* (1981) 449 U.S. 391, 392, the Supreme Court rejected that test, noting that it frustrates the very purpose of the attorney-

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client privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation, that such advice will frequently be more significant to noncontrol group members than those who officially sanction the advice, and that the test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

The Los Angeles County Bar Association Ethics Committee, in Formal Opinion 410 (march 24, 1983) opined that the reasoning of *Upjohn* could be logically extended to ex parte contacts with a corporate party's employee by opposing counsel because: (1) the corporate employee may be prejudiced either directly or indirectly by the ex parte contact; (2) the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel; (3) due to the difficulty of ascertaining whether an employee is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation; and (4) due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party who he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper. (See also San Diego County Bar Association Ethics Opinion 1984-5.) Both opinions found, after discussion of *Upjohn* and *Chadbourn*, that it is ethically improper for opposing counsel to contact, ex parte, any employee of a corporation or other entity that is a party to a suit, knowing that the information sought from the employee relates to the subject of the controversy.

However, the large number of comments received on this rule as presented in the Red Book, which proposed prohibiting members from communicating directly with the employee of a corporate opponent, stressed the hardship that such a prohibition would create on certain litigants. The employment discrimination bar, both public and private, pointed out that such a prohibition would make it virtually impossible to investigate claims prior to filing a suit, thus requiring more lawsuits to be filed and costly depositions taken. In addition, certain administrative proceedings have no mechanisms for formal discovery at all, thus making it possible that some potential witnesses would never be interviewed at all. As a result of these comments and many others, it is proposed that paragraph (B) utilize the "control group test."

Subparagraph (C)(1) carries forward exception for communications with a public officer, board, committee or body found in current rule 7-103.

Subparagraph (C)(2) is new and is intended to expressly permit a member to communicate with an individual seeking to hire new counsel or to obtain a "second opinion." Current rule 7-103 has sometimes been interpreted to prohibit an attorney from responding to such inquiries.

Subparagraph (C)(3) is new and is intended to make clear that where a statutory scheme or case law exists regarding communication with a represented party with respect to the subject matter of the representation, the statute or case overrides the rule.

[December, 1987 grey bound rule filing at pg. 24]

## RULE AMENDMENT HISTORY (2004)

### **Text of Rule 7-103 as Operative on January 1, 1975 (Appendix E of Publication 250)**

Rule 7-103. Communicating With An Adverse Party Represented by Counsel.

A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

### **Excerpt from 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility (Proposed Rule 7-103)**

Rule 7-103. Communicating With A Party Represented by Counsel.

A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

Comment. Rule 7-103 is the identical text of present Rule 12, Rules of Professional Conduct. See *Mitton v. State Bar* (1969), 71 C.2d 525, 534.

(Note: The version of proposed rule 7-103 as set forth above differs from the version adopted by the Supreme Court operative 1/1/75.)



## EXCERPT FROM SEPTEMBER 27, 2001 MEMORANDUM

**DATE:** September 27, 2001  
**TO:** MEMBERS OF THE COMMISSION  
**FROM:** MIKE NISPEROS, JR., CHIEF TRIAL COUNSEL  
**SUBJECT:** Rule 2-100

### **Rule 2-100. Communication with a Represented Party**

OCTC's recommends adding to the discussion section of the rule to clarify the rule's application and scope.

Revise the discussion section as follows:

. . .

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. Rule 2-100 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation. It applies even though the represented party initiates or consents to the communication.

There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal opportunity. Other applicable law also includes the right of the client to exercise a constitutional or other legal right to communicate with the government and the authority of government prosecutors and investigators to conduct criminal investigations a lawyer representing a government entity to conduct investigative activities, directly or through investigative agents, in the course of criminal, civil, or administrative matters, as limited by the relevant decisional law. However, when communicating with the accused in a filed matter, a government lawyer must comply with rule 2-100 in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Rule 2-100 is not intended to prevent parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice.

Rule 2-100 does not prohibit communication with a represented person, or an employee or agent of such person, concerning matters outside the representation, for example of the existence of a controversy between a government agency and a private party, or between two organizations. Nor does it prohibit a lawyer for either side from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does it prohibit a client who is represented by counsel from filing a complaint with a government agency and communicating with officials of that agency regarding the client's complaint.

*In the case of a represented organization, this Rule prohibits communications with a constituent of the organization, who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil, criminal, or administrative liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own lawyer, the consent of that lawyer to a communication will be sufficient for purpose of rule 2-100. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.*

## **OCTC COMMENTS:**

OCTC believes the rule as written is sufficient. However, we do recommend some changes to the discussion section of the rule. OCTC recommends that the discussion section clarify that rule 2-100 applies not just in the litigation context, but in all contexts where a lawyer represents a client. The discussion should also clarify that the rule applies when the other party initiates the communication. Lawyers, not clients, are obligated to know the rules and clients should not waive important rights without consulting their own lawyers.

OCTC recommends that the discussion section inform members that clients still have the right to communicate with the government. We also recommend that the language regarding criminal investigations by government attorneys and their investigators be expanded to apply to other non-criminal matters, including licensing regulation. The government has the right to conduct investigations involving civil and administrative enforcement as well as criminal prosecutions. These recommendations do not change existing law, but provide a more accurate and complete description of the law. We also want the government attorney to understand that while he or she may conduct or head an investigation, once a matter is filed there is an obligation on the part of the attorney to comply with rule 2-100.

OCTC also adds language to make it clear that this rule only applies when the communication covers the same subject matter. It should also be clear that the rule and its exceptions apply to organizations as well as individuals, but does not prohibit communications by a government agency investigating, or handling a complaint by the represented client.

Perhaps the most difficult aspect of this rule concerns an attorney communicating with employees and other individuals involved with a represented organization or entity. OCTC recommends adopting the ABA's proposed comments on this issue so that the members understand the rule. (See Model Rule 4.2) This does not change existing law, but would clarify it.

**DATE:** March 25, 2004  
**TO:** MEMBERS OF THE COMMISSION  
**FROM:** ETHICS HOTLINE STAFF  
**SUBJECT:** RULE 2-100

**Rule 2-100. Communication With a Represented Party**

1. **Proposed Amendment:** Expand this rule to include a member's ethical duty when communicating with an unrepresented party.

**Question(s) to the Hotline that this proposed amendment would address:**

In a marital dissolution, where only one party is represented by counsel, what duties are owed by the attorney to the unrepresented party with whom the attorney must communicate?

2. **Proposed Amendment:** Explain that rule 2-100(A) provides only for actual knowledge. Lawyers should not be at risk of discipline because they should have known that an opposing party was represented or would be represented at some time in the future. (*Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183, 1188; see also *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401-1402.)

**Question(s) to the Hotline that this proposed amendment would address:**

May I contact a person to determine if they're represented by counsel?

Attorney for other side "ceases to act as such" (CCP §286) and the opposing side's lawyer is unclear whether the party will actually retain a new lawyer

3. **Proposed Amendment:** Specify whether “party” includes a non-party witness represented by counsel. (Cf. Proposed Cal. State Bar Formal Opn. Interim No. 98-0002.)

**Question(s) to the Hotline that this proposed amendment would address:**

May I contact adverse witnesses?

Specifically, may I contact non-employee witnesses for opposing party?

May I contact adverse witnesses even though instructed by opposing counsel not to do so?

In-house counsel claims to represent corporation and its witnesses/employees.

4. **Proposed Amendment:** Add a specific explanation of the meaning of “a public officer, board, committee, or body” as used in rule 2-100(C)(1).

May an attorney representing a plaintiff against a city contact a city official to discuss that official’s proposed policy where that policy relates to the plaintiff’s claim against the city?